or voluntarism. But gun control was hardly our only concern and was not a major issue in our campaign literature. In the 20 years before the recall, Howard volunteered for such causes as tax limits, victims' rights, and education reform. The recall coalition he organized included statewide non-gun-rights groups (e.g., People's Advocate, Doris Tate Crime Victims Bureau, Citizens for Law & Order).

The FPPC states, "Petitioners claim that professional campaigns commonly file delinquent . . . statements . . . However, Petitioners . . . could not practicably offer evidence . . . as thousands of campaign statements are filed each year." (Response at 7). We don't mean that reports are *usually* late, but that it's not uncommon. FPPC enforcement pages are replete with phrases like "failed to timely file" associated with fines a tiny fraction of ours.[10,11,12] The typical $10-a-day fine is often reduced or waived. Most late filings, even if fined, never face enforcement proceedings or show up in enforcement records (e.g., our 1992 fines don't show up). Through 2000, there were 643 enforcement cases involving late filing, no filing, money laundering, and combinations of them, accounting for 77% of the cases. The average fine was $17,441—just 2% or 1/46th of our fine. The average in all cases through the present is $11,159—1.4% or 1/76th of our fine.

Response at 7 is misleading. We did not deem nondisclosure as good faith, but rather disclosing as much as possible without compromising safety by giving street addresses (to Roberti and the media). Howard's total cooperation in providing all available missing information to the FPPC during audit is also good faith. The FPPC implies they

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[10] FPPC, Summaries of Past Enforcement Cases A-Z at www.fppc.ca.gov/index.html?id=224

[11] C038246, Appellants Appendix at 272 #7 & 290-347

[12] 96AS00039, Opposition of Russell Howard to Plaintiff's Motion for Summary Judgment, Ex. 7-8

found information on their own, but it was all disclosed by Howard during audit. We were fined as if nothing was disclosed at the audit.

The FPPC states, "Petitioners assert that the penalty for not filing . . .is substantially less than . . . for filing an incomplete . . . statement. . . This . . . is without merit. The PRA contains . . . criminal penalties. . ." (Response at 8) It does have misdemeanor penalties, but the FPPC did not have jurisdiction to enforce them until 1996's Proposition 208 (see Proposition 208: Text of Proposed Law, vote96.ss.ca.gov/Vote96/html/BP/208text.htm, Cal. Gov't. Code §§ 91000, as amended. We would've been better off charged with a crime: we would not have been tried in absentia, and our rights to fair trial, presumption of innocence, and adequate legal assistance would've been honored.

REASONS FOR GRANTING THE WRIT

I. THE CALIFORNIA COURT'S DECISION DEPRIVES US OF A REASONABLE OPPORTUNITY TO HAVE OUR RIGHTS HEARD AND DETERMINED.

Respondents argue that an independent State ground existed to support the California courts' refusal to entertain our constitutional claims, while conceding that this claim is inapplicable where a petitioner has been deprived of a reasonable opportunity to have his or her claim heard and decided below.

Respondents do not contest our first demonstration that we were deprived of such a reasonable opportunity. When Respondent brought an enforcement action, our attorney counterclaimed, seeking writ of mandate. Respondent agrees that this was means to raise a constitutional objection. The trial court judge (whom we later discovered had been a close political ally and business associate of the target of our recall petition) ruled the case was not prosecuted expeditiously and dismissed the *defense* counterclaim while retaining, over objection, plaintiff's action. The trial court then ruled that the

constitutional objections could not be raised as a defense to the surviving action, but only via the counterclaim that it had already dismissed. It thus was able to use its discretionary powers to decide the case while evading consideration of the constitutional infractions.

Respondent does touch upon (Response at 12-13) our second reason why we were deprived of an adequate opportunity to have our claims determined, namely that in a mandamus challenge the agency's actions are afforded a strong presumption of correctness. Respondent contends that this presumption only relates to the agency's factual findings.[13] *Yamaha Corp. v. State Board of Equalization*, 19 Cal.4th 1, 960 P.2d 1031, 78 Cal.Rptr.2d 1 (1998), which respondent cites as proof that California courts exercise independent judgment on legal questions during a mandamus action, actually concludes that courts should apply a varying scale of deference to the agency's legal findings. *See also Sharon S. v. Superior Court of San Diego County*, 31 Cal.4th 417, 73 P.3d 554 (2003) (citing *Yamaha* while giving "great weight" to agency legal conclusions.).

II. WE DID NOT WAIVE OUR RIGHT TO ASSERT OUR CONSTITUTIONAL RIGHTS IN THIS LITIGATION.

Respondent argues that the First Amendment issue (which it curiously treats as asking for a "special exemption" from the law) is foreclosed because *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982), concerned a minor political party, and Respondent argues that CAC was not a minor party but "dramatically affected the political landscape in California." (Response at 14).

Respondents take the paradoxical position that any group of citizens (not only a political party) has a right of asso

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[13] Ruling upon our First Amendment defense would have required factual determinations: the significance of the threat, its chilling effect, the strength of the State interest, etc.

ciation in this context only if it can have no impact on the political status quo. That finds no support in the rulings of this Court. The petitioner in *NAACP v. Alabama*, 357 U.S. 449 (1958), certainly had a measurable impact on the status quo.

We respectfully submit that, contrary to Respondent's position, First Amendment rights exist *precisely* to challenge the political status quo. Moreover, it is precisely the group that endangers the political status quo which will become a target for retribution. CAC's efforts were ending the career of a Senate President while breathing life into a recall process that had been dormant for 80 years; both were seen as a threat to the political establishment. The Socialist Worker's Party did not have its phone lines cut, nor have its supporters named and demonized in the mass media.

As to the Sixth and Seventh Amendment issues, FPPC's argument becomes circular in practice. We contend that, in light of the enormous nature of the punishment imposed, it should be treated as criminal rather than simply civil, and we should have been accorded the right to appointed counsel so that legal defenses could be properly raised. FPPC's response is essentially that the legal defenses should have been properly raised. It was precisely the denial of rights which led to the issue not being raised before FPPC.

III. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES US OF OUR EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND FLIES IN THE FACE OF THIS COURT'S RULINGS.

Respondent's position on the Eighth Amendment is as astonishing as its position on the First. It contends that a penalty is never excessive unless it exceeds the limits of statute. (Response at 14 and n. 9). It cites none of this Court's jurisprudence for that breathtaking proposition, by which a State might, with appropriate legislation, impose a million-dollar penalty for a parking infraction, yet claim immunity from the Eighth Amendment.

There is a reason for this absolutist view of the 8th Amendment. Respondent cannot defend its actions by any other standard. In the California courts, it conceded that (a) the penalty was imposed without any evidence of our financial condition; (b) the penalty imposed was of a size, and a method of calculation (charging failure to report name, address, and amount as separate offenses) without precedent in Respondent's history; (c) even major offenses involving laundering millions of dollars and hundreds of violations were punished with penalties a fraction of that imposed here. See Opposition of Russell Howard to Plaintiff's Motion for Summary Judgment, Ex. 8; FPPC's Objections to Evidence Proffered by Howard, at 5-8.

Respondent invokes *United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003), which upheld a $729,454 penalty for Medicare fraud. Pivotal to that result, however, were the facts that the defendant had willfully submitted 1,459 false claims totaling $58,151. In fact, on the civil fine portion of the judgment, the District Court assessed the *minimum* penalty available under the statute, and applied that only to one claim per beneficiary per year.

IV. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES US OF OUR FIRST AND FOURTEENTH AMENDMENT RIGHTS.

We respond above to Respondent's contention that associational rights of the type at issue here are only protected when those associating are unable to change the political status quo. Should the Court grant certiorari on the issues raised above, we request that it also consider a grant to review this matter.

CONCLUSION

For the foregoing reasons we respectfully submit that the Court should grant a writ of certiorari to review the decision of the California Supreme Court or remand for due consideration of our constitutional rights.

Respectfully submitted,

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Petitioners

APPENDIX

CAC, page 19 of Recipient Committee Campaign Disclosure Statement for 7/1/93-12/31/1993

10/07	Jack Stuart, Barbara Stewart Cloverdale, CA	100
12/02	Ben & Marcella Petra Burtonsville, MD	100
12/16	R.L. Aldrich Denton, TX	100
10/22	Curtis L. Debora Roseville, CA	100
10/28	Philip Lebow Los Angeles, CA	100
12/19	Paula Mueller Los Gatos, CA	150
12/06	John J. Brooks Arlene Brooks Sylmar, CA	122
12/05	K.R. Hoffman Hawthorne, CA	100
12/03	Charles Warfield Krum, TX	100
		$ 972